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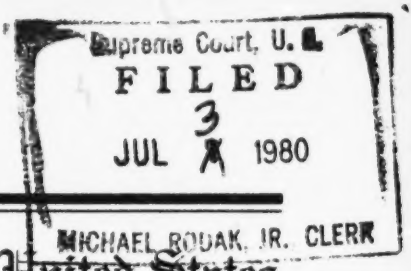

In the Supreme Court of the United States

OCTOBER TERM, 1980

ERNEST L. BOWERS, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
(No. 78-3654)

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (No. 78-3654)

ERNEST L. BOWERS, Petitioner, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit. The Judgment on the case is undated and was filed April 7, 1980. A Petition for Rehearing was filed under extension on May 6, 1980 and was denied May 19, 1980. This Court, by Justice William H. Rehnquist, extended the time to file this Petition to July 3, 1980.

OPINIONS BELOW

The Opinion of the Ninth Circuit Court of Appeals was noted as not for publication. It is reproduced as Appendix A, infra p. A-1. The jury found Bowers guilty and the Court sentenced him to two years in prison.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC §1254(1). This Petition for Certiorari is filed within the extended time allowed as aforesaid.

QUESTIONS PRESENTED

The Petitioner was convicted in the United States District Court for failure to pay over withheld taxes belonging to employees. He was indicted and convicted under 26 USC §7201, the tax evasion statutes, not 26 USC §7202, the "failure to pay over" statute. At trial, the Defense was based almost entirely on Petitioner's lack of funds and inability to pay over the withheld funds. The Trial Judge approved an instruction on lack of funds to pay, but withdrew the instruction after Petitioner's final argument.

The Questions thereby arising are:

1. Petitioner was denied his right to due process under the Fifth Amendment as he was charged and convicted under the wrong statute, depriving him of a defense allowed under the right statute.

2. Petitioner's defense was emasculated when the Trial Judge failed to follow Federal Rule of Criminal Procedure 30 mandating rulings on instructions prior to final argument. Especially where, prior to argument, a favorable ruling was given, then withdrawn after argument.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment Five.

"No person shall . . . be deprived of life, liberty or property, without due process of law."

18 USC §3771, §3772, 26 USC §7201, 26 USC §7202; Federal Rules of Criminal Procedure Rule 30.

STATEMENT OF FACTS

Ernest Bowers, during the Spokane World's Fair in 1974, owned all the stock in Fatty Copperfield's, Inc., whose sole asset was a restaurant located across the street from the fairgrounds. The restaurant had many employees, and Bowers could not pay over the withholding and F.I.C.A. of these employees.

He was indicted under 26 USC §7201 and was convicted by the jury on two counts of tax evasion.

The theory of defense (R 524, 525, 526, 528, 581-597) was that by the time the returns were due, Bowers, whose restaurant was operating at a loss, had no money to pay the withholding. The prior owner testified he operated at a loss (R 35, 42) and that he, in effect, unloaded a "loser" on Bowers.

After the prosecution put on its first witness, the defense moved to dismiss on the ground that the action was brought under the "evasion" statute, 26 USC §7201 and not 26 USC §7202 the failure to pay over a tax withheld. The Trial Court overruled Defendant's written Motion to Dismiss at the end of the case (R 119).

The Defendant informed the Court of his theory of defense early in the trial (R 39) and throughout the trial (R. 616, 621). After both sides had rested and prior to final argument, the Trial Judge ruled that the following instruction be given (R 619, 621).

> "To establish willfulness, the Government must establish beyond a reasonable doubt that at the time payment was due, the Defendant possessed sufficient funds to enable him to meet his obligation, or the lack of sufficient funds on such date was created by or was the result of a voluntary and intentional act without justification in view of all the financial circumstances of the Defendant."

This was the only instruction on lack of funds to pay over and was satisfactory to the Defendant. Final arguments were, for some reason, not recorded. The Defendant did not waive such transcription.

After the argument of both parties, Judge Enright, the Trial Judge, over Defendant's timely objection (R 649-650) totally reversed his decision on the instruction without reason and in its place gave an ambiguous instruction totally devoid and without mention of lack of funds as follows (R 649).

> "For you to find that the Defendant acted willfully, the Government must have shown beyond a reasonable doubt that the Defendant voluntarily and intentionally violated it, knowing the legal duty as discussed in these instructions."

This completely surprised and effectively scuttled Defendant's defense of lack of funds. Since this was the only substantive defense, a conviction followed.

The record shows that this instruction was necessary and heavily relied upon by the Defendant throughout the trial. The reversal of the Trial Judge after Defendant's final argument was totally contrary to the Rules of Court and totally impaired the effectiveness of the defense.

REASONS FOR GRANTING THE WRIT

1. Allowing the Defendant to be charged under the wrong

statute removed the key defense, thus violating the Defendant's right to due process.

In *Wilson v. U.S.*, 250 F.2d 312 (CA 9 1957) the Ninth Circuit said at 319:

> "The Supreme Court's precise holding in the *Spies* case was that the District Court erred in refusing to give a requested instruction that if the jury found only that defendant had willfully failed to make a tax return and willfully failed to pay the tax due, then it could not find the defendant guilty of a willful attempt to defeat and evade the income tax."

In *Reynolds v. U.S.*, 288 F.2d 78 (CA 5 1961) where the Defendant failed to pay over gambling tax and also evaded it, the Court held that the offenses were different. The Court interpreted *Spies v. U.S.*, 317 U.S. 492, 87 L.Ed 418 (1943) 63 S.Ct. 364, as follows on 80:

> "The Court held that the section making criminal a willful attempt to evade a tax dealt with a different crime than that which made criminal a willful failure to pay."

The harm to Petitioner Bowers in this case is that under the Ninth Circuit criminal cases brought under §7202, lack of funds is a complete defense. The case directly in point is *U.S. v. Poll*, 521 F.2d 329 (CA 9 1975) reversing a conviction where evidence of lack of funds was not admitted. The Ninth Circuit states unequivocally on 333:

> "We believe that to establish willfulness the Government must establish beyond a reasonable doubt that at the time payment was due the taxpayer possessed sufficient funds to enable him to meet his obligation or that the lack of sufficient funds on such date was created by (or was the result of) a voluntary and intentional act without justification in view of all the financial circumstances of the taxpayer."

2. A ruling by the Trial Court in a criminal case to allow Defendant's most important instruction prior to final argument then withdrawing the instruction after final argument is so far a prejudicial departure by the Trial Court that this Court's power of supervision must be invoked.

Under 18 USC §3771, 3772, this Court has supervision and power to prescribe rules of practice for all District Courts.

Rule 30 of the Federal Rules of Criminal Procedure was approved pursuant to the above statutes and reads in total as follows:

> "Rule 30. Instruction. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. *The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury,* but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury." (Italics supplied)

The Rule uses the word "shall", thus the Court's final decision regarding instructions before argument is mandatory.

The Ninth Circuit, in reversing a criminal case, said in *Wright v. United States,* 339 F.2d 578 (CA 9 1964) at 580:

> "It was the court's failure to advise counsel of its ruling prior to closing argument, not the soundness of that ruling, which violated Rule 30 and prejudicially affected counsel's summation."

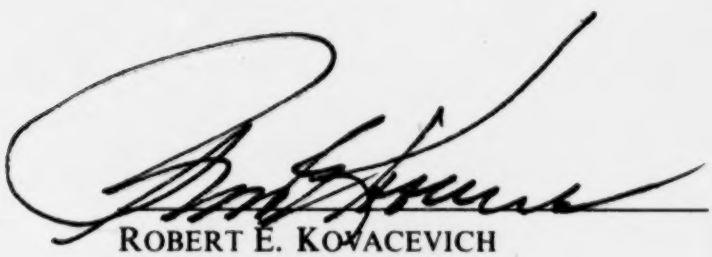
To the same effect is *U.S. v. Baker,* 373 F.2d 28 (CA 6 1968).

Failure to properly instruct in a criminal case is a denial of due process. *Lyons v. Oklahoma,* 322 U.S. 596, 88 L.Ed. 1481, 64 S.Ct. 1208 (1944).

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,



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Dated: July 3, 1980.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

v.

ERNEST L. BOWERS,
DEFENDANT-APPELLANT.

No. 78-3654

MEMORANDUM

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

Before: KILKENNY, SKOPIL and PREGERSON, Circuit Judges:

A jury convicted Ernest Bowers of two counts of attempting to evade federal taxes under 26 USC §7201. For the third and fourth quarters of 1974 Bowers failed to file the required tax forms or pay over employee income withholding taxes and social security contributions for a restaurant he operated.

Bowers challengs his conviction on two grounds: (1) the evidence was insufficient because it does not show an attempt to evade or defeat tax, and (2) the seizure of certain payroll records used as evidence against him was unreasonable. We affirm the conviction.

I. SUFFICIENCY OF EVIDENCE OF TAX EVASION

The elements of the offense defined in 26 USC §7201 are (1) willfulness, (2) existence of a tax deficiency, and (3) an

affirmative act constituting an evasion or an attempted evasion. *Sansone v. U.S.,* 380 U.S. 343 (1965); *U.S. v. Buckner,* _____ F.2d _____ , Slip Op. at 1440, 1443 (9th Cir. 1979). We must take the evidence in a light most favorable to the government. *Glassner v. U.S.,* 315 U.S. 60, 80 (1941); *U.S. v. Lincoln,* 494 F.2d 833, 840 (9th Cir. 1974).

Bowers' reliance on *Wilson v. United States,* 250 F.2d 312 (9th Cir. 1958), 264 F.2d 74 (9th Cir. 1959) (appeal following remand), and *United States v. Jannuzzio,* 184 F.Supp. 460 (D. Del. 1960), is misplaced. Those cases stand for the proposition that diversion of funds alone will not support a conviction for tax evasion. Here there was ample evidence, apart from any evidence of simple diversion, from which the jury could conclude that Bowers sought to evade tax. Bowers told an Internal Revenue Agent that he was only the manager and not the owner of the restaurant, that he had not seen the tax form for the third quarter at the time it should have been filed, that he never hired employees, that he did not keep business records at home, and that he never took cash from the restaurant till.

Bowers' statements conflicted with testimony of several witnesses. Their testimony indicated that Bowers was responsible for filing the tax forms, that he knew of the tax obligation and intentionally did not file the forms, that he burned business records, and that he gave false answers to the investigating Internal Revenue Agent. Misleading or false answers to the investigating officer are acts of concealment that go beyond the mere failure to file tax forms. The jury was entitled to believe these witnesses. We hold the evidence was sufficient to convict Bowers of tax evasion.

II. REASONABLENESS OF SEIZURE OF THE RECORDS

Warrantless searches and seizures of abandoned property are reasonable. *Abel v. United States,* 362 U.S. 217, 241

(1960); *United States v. Jackson,* 544 F.2d 407, 409 (9th Cir. 1976); *U.S. v. Cella,* 568 F.2d 1266, 1283 (9th Cir. 1977). The standard of review of a trial court finding of abandonment is the clearly erroneous standard. *United States v. Humphrey,* 549 F.2d 650, 652 (9th Cir. 1977).

Bowers asserts that the trial court erred in finding that he had abandoned his rented house. He argues that the personal property which the landlord found in the house precluded a finding of abandonment.

The trial court's conclusion was not clearly erroneous. Bowers told Dr. Durham that he would vacate by February 10. The property which Bowers left in the house, and on which his argument is based, did not include property owned by him which was valuable enough to conclude that Bowers had not followed through with his agreement to vacate. Thus Dr. Durham's entry and his consent to the agent's entry did not violate a reasonable expectation of privacy in the house.[1]

Affirmed.

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[1]Although property law is not controlling, it does provide a useful comparison in determining whether Bowers retained a reasonable expectation of privacy in his rented house. *See United States v. Wilson,* 472 F.2d 901, 902 (9th Cir. 1972), *cert. denied,* 414 U.S. 868 (1973). Under Washington State law, if the tenant does not pay rent and indicates his intention not to resume tenancy, he is deemed to have abandoned the property. The landlord may reenter the premises and take custody custody of any personal property therein. Wash. Rev. Code §59.18.310 (Supp. 1976).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA
PLAINTIFF-APPELLEE,

v.

ERNEST L. BOWERS,
DEFENDANT-APPELLANT.

No. 78-3654

ORDER

Before: KILKENNY, SKOPIL and PREGERSON, Circuit Judges

Bowers' peition for rehearing is denied.

Supreme Court, U. S.
FILED
SEP 19 1980
MICHAEL RODAK, JR., CLERK

No. 80-17

In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 80-17

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was indicted under the wrong statute and that the trial court erred in failing to rule on a jury instruction that he had requested prior to closing arguments.

After a jury trial in the United States District Court for the Eastern District of Washington, petitioner was convicted on two counts of willfully attempting to evade federal taxes, in violation of 26 U.S.C. 7201 (Pet. App. A-1). The district court sentenced him to a two-year term of imprisonment on each count, the sentences to run concurrently. The court of appeals affirmed (Pet. App. A-3).

Through his wholly owned corporation, Fatty Copperfield, Inc., petitioner operated and controlled Fatty Copperfield's, a restaurant in Spokane, Washington (Pet. 3). The indictment charged that petitioner had knowingly and willfully attempted to evade and defeat assessment of taxes owed by Fatty Copperfield, Inc., for the third (Count I) and fourth (Count II) quarters of 1974. At trial, the government introduced evidence showing that a tax return for the third quarter of 1974 had been prepared by an accounting firm and delivered to the petitioner (Tr. 187-188, 350). Petitioner was aware of the time within which the return was required to be filed (*ibid.*). Although the return revealed both the FICA taxes due and the income taxes that had been withheld from the wages of Fatty Copperfield's employees, petitioner failed to file the return (Tr. 187-188, 350, 418).[1] Nor did petitioner file a return for the fourth quarter of 1974 (Tr. 418).

The government's evidence demonstrated that petitioner had attempted to conceal his operation and control of Fatty Copperfield's from the Internal Revenue Service (Tr. 445-449). Petitioner's wife testified that he had told her that he kept two sets of books for the business (Tr. 309-310). The evidence also showed that petitioner removed the books and records of Fatty Copperfield's to his home, told his wife that he intended to burn them, and, in fact, burned some of the records when he abandoned the business and left Spokane, Washington (Tr. 308-309, 271-272). One of the former employees of Fatty Copperfield's testified that petitioner took approximately $1,000 each week from the cash

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[1]The third quarter return was prepared for petitioner's signature by typing his name on the return, but petitioner instructed an employee to remove his name from the return (Tr. 351-352).

register (Tr. 349).[2] Petitioner nevertheless told the Internal Revenue Service agent who investigated the case that he was just an employee of Fatty Copperfield's (Tr. 445-446), that he took no cash from the restaurant till (Tr. 450), that he did not discuss the taxes involved here with an accountant (Tr. 452-453), and that he did not keep any corporate records at his home (Tr. 450).[3]

1. Petitioner argues (Pet. 4-5) that he should have been charged with a violation of 26 U.S.C. 7202,[4] rather than 26 U.S.C. 7201.[5] That contention is frivolous. *E.g., United*

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[2]Another witness testified that petitioner regularly carried large sums of cash (Tr. 300). Petitioner told an acquaintance that the restaurant "did real well" and that he had left Spokane owing the government more than $250,000 in taxes (Tr. 225, 228, 230).

[3]In addition, there was evidence that a number of employees of Fatty Copperfield's were never given copies of Form W-2 for 1974 (Tr. 329). A Form W-2 is a wage and earnings statement for the year, which shows, *inter alia*, the amount of income tax and FICA tax withheld from wages. The employer is required to file one copy of each Form W-2 with the government (26 C.F.R. 31.6051-2(a)).

[4]Section 7202 provides as follows:

> Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

[5]Section 7201 provides as follows:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

States v. *Batchelder,* 442 U.S. 114, 124 (1979); *Bordenkircher* v. *Hayes,* 434 U.S. 357, 364 (1978). As this Court recently explained, a criminal "defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution" (*United States* v. *Batchelder, supra,* 442 U.S. at 125). That petitioner would have had a better chance of acquittal if he had been charged under 26 U.S.C. 7202 is of no constitutional significance.[6]

2. Petitioner also argues (Pet. 6-7) that the trial court erred in failing to indicate prior to closing arguments that it did not intend to give an instruction he had requested regarding willfulness. Prior to closing arguments, the trial court indicated it would give the following instruction (Tr. 618):

> To establish willfulness, the government must establish beyond a reasonable doubt that at the time payment was due, the taxpayer possessed sufficient funds to enable him to meet his obligation, or that the lack of sufficient funds on such date was created by or was the result of a voluntary and intentional act without justification in view of all the financial circumstances of the taxpayer.

After closing arguments (Tr. 632), however, the court, upon motion of the government (Tr. 647), informed counsel that this instruction would not be read (Tr. 648-649). Instead the court instructed the jury as follows (Tr. 675-676):

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[6]Since the evidence in this case was more than sufficient to support the jury's inference of a willful attempt to evade and defeat taxes, this Court's decision in *Spies* v. *United States,* 317 U.S. 492 (1943), does not suggest a contrary result.

An attempt to evade or defeat a tax must be a willful attempt. That is to say, it must be an attempt made voluntarily and intentionally with the specific intent to keep from the government a tax imposed by the income tax laws, which is the legal duty of the accused to pay to the government, and which the accused knew it was his legal duty to pay.

* * * * *

An act or failure to act is willfully done if it's done voluntarily and intentionally, and with the specific intent to do something the law forbids, or the specific intent to fail to do something the law requires to be done. * * *

To establish the crime of income tax evasion as charged in the Indictment, the prosecution must prove beyond a reasonable doubt that the defendant willfully attempted to evade or defeat a tax due the government. This involves a specific intent to evade the tax and some willful commission of affirmative—or affirmative action by the defendant in furtherance of that intent.

By way of illustration only, a willful intent may be inferred from a consistent pattern of understatement of income, or for such conduct as the destruction or falsification of books or records, the maintenance of a double set of books, * * * the concealment of assets or income, or such other conduct which would be likely to mislead or conceal.[7]

Were you to find that the defendant acted willfully, as used in these instructions, the government must have shown beyond a reasonable doubt that the

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[7]See *Spies* v. *United States, supra,* 317 U.S. at 499.

> defendant voluntarily and intentionally violated a known legal duty as discussed in these instructions.

Contrary to petitioner's claim, no error resulted from this sequence of events.

The closing arguments were not transcribed (Tr. 632). It is thus impossible to determine whether the argument of petitioner's counsel was structured in reliance upon the instruction the court had indicated it would give.[8] Even if it is assumed that petitioner's counsel relied upon the trial court's proposed instruction to argue that petitioner had not acted willfully because, through no fault of his own, he lacked the ability to pay the tax, petitioner cannot contend under the circumstances of this case that this resulted in prejudice to him. Petitioner was charged with violating 26 U.S.C. 7201 by willfully attempting to defeat and evade the assessment of federal taxes. See *United States* v. *Jannuzzio,* 184 F. Supp. 460, 465 (D. Del. 1960). A defendant's financial circumstances are no justification for willful and affirmative actions undertaken to hide tax liability from the government. An excusable inability to pay the tax or an intent to pay the tax at some time in the future does not detract from the criminality of willful acts defeating the assessment of the tax. See *Sansone* v. *United States,* 380 U.S. 343, 354 (1965). Accordingly, petitioner was not entitled under the circumstances of this case to defend against the charges against him on the basis that he lacked the ability to pay the taxes.[9] He was thus not

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[8]It should be noted, however, that petitioner contends (Pet. 4) that he "heavily relied" on his asserted lack of funds to pay the taxes "throughout the trial." His "defense of lack of funds" would therefore have been no less "effectively scuttled" had the trial court ruled correctly on his request for this instruction before the closing arguments.

[9]Petitioner appears to concede in connection with his first argument (Pet. 4-5) that lack of funds is not a defense to a charge of attempted tax evasion.

entitled to the instruction the court initially indicated it would give and the trial court's subsequent refusal to give that instruction was clearly correct. Allowing petitioner to assert this defense in his closing argument gave him more than he was entitled to.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

SEPTEMBER 1980

DOJ-1980-09